

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)

SOUTHWESTERN BELL CORPORATION'S PETITION
FOR RECONSIDERATION OF SECOND REPORT AND ORDER

Comes now Southwestern Bell Corporation ("SBC") and on behalf of itself and its operating subsidiaries respectfully requests that the Federal Communications Commission ("Commission or FCC") reconsider certain rulings contained in the *Second Report and Order* herein ("Order"), adopted March 8, 1994 and released April 20, 1994. Specifically, SBC seeks reconsideration of three items. First, the Commission should simplify or eliminate its complex activity rules. Second, the Commission should not require significant disclosure of information related to license transfers, except in the case of transfers by designated entities. Finally, the name of each round's winning bidder, as well as the winning bid amount in that round should be announced.

I. THE COMMISSION SHOULD ABANDON THE ACTIVITY RULES ADOPTED IN THE ORDER.

Without question, the activity rules adopted by the Commission for auctions with simultaneous closing rules will interfere with the natural activity of the market in setting the value of the spectrum auctioned and are much too complex. The *Order* acknowledges as much, conceding that the activity rules can be imposed only "...[a]t the cost of some added complexity and some limitation on bidding flexibility...." *Order*, ¶ 136. The Commission defends this choice, however, by noting that the three

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stage Milgrom-Wilson rule encourages bidders to participate in early rounds. *Id.* This result is deemed advisable by the Commission because the agency also adopted a simultaneous stopping rule for use in simultaneous auctions. The simultaneous stopping rule keeps all markets open as long as any bidder wishes to participate, which increases the possibility of obtaining a set of interdependent licenses. However, simultaneous stopping could incent bidders to hold back, until prices approach equilibrium, before making a bid. Thus the FCC added the three stage Milgrom-Wilson activity rule, the most complex of all solutions proposed. Given the single adverse result of such lingering is that it might lead to "very long" auctions (*id.*, ¶ 133), however, the proposed three stage Milgrom-Wilson rule is too complex and unnecessary.

In the view of SBC, the Commission has opted for the more injurious set of circumstances. The very purpose of applying a simultaneous stopping rule for simultaneous auctions is that it allows maximum bidding flexibility. *Id.*, ¶ 130. Such flexibility is critical to achieving the purpose of conducting such auctions simultaneously, i.e., allowing the bidder which sets the highest value on a given license or set of licenses to purchase the license(s). If the stopping rules allowed one auction to close before another related auction, the bidder might miss the opportunity to obtain its desired combination of interdependent licenses. In the Commission's words, "We are also persuaded...that simultaneously closing markets for interdependent licenses -- is most likely to award licenses to the bidders who value them most highly." *Id.*, ¶ 136. SBC does

not quarrel with the Commission on this point.¹

However, the three stage Milgrom-Wilson activity rule chosen by the Commission for simultaneous closing auctions is much too complex. Again, the *Order* concedes the point. "We are concerned, however, about the possible complexity of a three stage Milgrom-Wilson activity rule." *Id.*, ¶ 143. The complexity, indeed, is monumental in the face of the number of licenses to be auctioned in the personal communications services field. The number of different upfront payments which could be made, and the corresponding level of activity which must be displayed by each bidder, could easily amount to the total number of participants. Yet the Commission intends to track each bidder's participation in each license auction round, total them all, compare it to the upfront payment calculation made by each AND inform the bidder if it has violated the activity rule, all before the results of the auction round are announced!

In acknowledgment of this complexity, the Commission proposes two solutions. First, it announces that it intends to develop software to track activity levels and match them against upfront payments. Second, the FCC intends to allow bidders five automatic waivers of the activity rules and to permit additional waivers "for circumstances beyond a bidder's control." Neither of these alternatives, however, alleviate the complexity issue.

¹SBC does note that the Milgrom-Wilson activity rule is almost certain to allow bidders who do not value the licenses most highly a greater probability of success. In essence, the rule requires bidders either to participate in auctions which are not their highest priority, in order to protect the opportunity to participate in later rounds, or bid unnecessarily high bids early in the bidding. Again, the FCC admitted as much when it rejected the variant of the three stage Milgrom-Wilson rule which would require participation in all rounds at the full extent of the upfront payment. *Id.*, ¶ 140.

The software described in the Order does not yet exist and, in all probability, has not yet been commissioned.² As described above, the variations of activity level may be extremely wide, making the algorithms supporting the software more complex and therefore more difficult to develop. Given the recent push by the FCC to initiate the PCS auctions, it is likely that the software will not be available in time for the first auctions.³

Moreover, the need for flawless performance of the software, without any opportunity for real-world testing beforehand, makes the utility of this solution even more remote. The experience of the competitive bidding demonstration conducted at CalTech and sponsored by the National Telecommunications and Information Administration ("NTIA") on January 27, 1994, proves the point. In the demonstration, the software failed so badly that the auctions could not continue because no one could determine the winning bid or the party submitting it. While the CalTech software was designed to identify winning bids,⁴ not bids which would be disqualified due to activity rules, the failure points up both the risks of a repeat performance and the

²SBC points out that to be useful to participants, such software should be available before the auction to allow participants to test bid strategies against the rules. Also, pre-auction availability would allow bidders to test the program before relying on it. However, multiple versions would be necessary to ensure compatibility with bidders' own software and operating systems.

³In fact, the Commission has indicated already that the July auctions may not be computerized because the auction software has not been completed. See comments of Ralph Haller, *Mobile Phone News*, May 30, 1994, p. 2.

⁴Presumably easier than administering the complex activity rules.

uncertainty of relying upon software to overcome complexity. It also demonstrates how far the Commission really is from developing an acceptable and dependable software solution.

The waiver system proposed by the Commission only highlights the activity rule's complexity. It certainly does nothing to rectify the uncertainty and expense the activity rule imposes. In fact, the availability of five automatic waivers actually may make bidding strategy even more complex by building in such "mistakes." Additionally, the opportunity for unlimited waivers for true "mistakes" means that no one really need fear the penalty. Instead, as soon as one bidder exhausts his automatic waiver quota, each bidder must await another bureaucratic layer in the process: resolution of waiver requests based on "circumstances beyond the bidder's control."

Given these problems, SBC urges the Commission to reconsider the activity rule. Since the rule is designed to facilitate the timely closure of auctions and to prevent bidders from waiting until the end of the auction before participating, the Commission can easily achieve the same purpose adopting two changes. First, it should alter the stopping rule slightly. The Commission should monitor each round and close all bidding after any round which seems particularly slow⁵ by issuing a notice that bidding will close after "X" more rounds. Second, the Commission should adopt a simpler activity rule, such as requiring bidders to be active on a single license in each round. By preannouncing its intention to close bidding after a certain

⁵Little bidding activity in any given round could indicate that all the interdependence of licenses has been expressed in current bid configurations.

number of rounds, the Commission could simulate simultaneous stopping, with little effect on bid prices.

Because the three stage Milgrom-Wilson activity rule will not achieve its purpose and is unnecessarily complex, SBC urges the Commission to adopt these two revisions. Together the changes will permit greater bidding flexibility, forestall bidders from waiting too long to bid and simplify an already complicated process.

II. THE COMMISSION SHOULD MINIMIZE TRANSFER DISCLOSURE REQUIREMENTS.

The prospect of unjust enrichment due to an inefficiency in the auction process has caused the Commission understandable discomfort, for the FCC previously conducted hearings to determine the most meritorious applicant for mutually exclusive licenses. Congress may have sparked the concern by its charge that the Commission "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary [emphasis added] to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E).

As the Order acknowledges, however, and the House Report on the Budget Reconciliation Act suggests, the risk of unjust enrichment is high only in auctions where special accommodations are provided to designated entities. The House Report notes that "in a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license...." H.R. Rept. No. 103-111 at 257. The very purpose of a competitive auction is the establishment of a fair market price of the

resource at the time of initial allocation, rather than in the resale market, which may be less reliable.⁶ Therefore, rules designed to prevent unjust enrichment should be solely applicable, if at all, to designated entities which receive special accommodations.

Accordingly, imposition of the requirement to disclose onerous and competitively sensitive information is simply unnecessary except in the case of specially treated participants. Again, the Order concedes the point, acknowledging that the relevant legislative history indicates that the Congress' concern was limited to applicants specially treated in the bidding process. The only rationale given in the Order for imposing disclosure requirements on all applicants is the Commission's "lack of previous experience with the competitive process...." The Commission may satisfy the mandate of the Budget Reconciliation Act to "...avoid[] excessive concentration of licenses" and "disseminating licenses among a wide variety of applicants" by minimizing auction designs which encourage or favor nationwide licenses or limit information regarding successful bidders. The only information regarding license transfers (excluding those involving designated entities) which need be filed should be the names of all participants and identification of their corporate history.

Additionally, the disclosure requirements imposed by the Order very likely will impede the formation of reasonable and

⁶Of course, this assumption does not mean that values will not change as time passes, nor does it mean that total expressions of value may be higher when several participants pool resources. The initially disclosed information thus will have no value in measuring the "unjustness" of later transfers.

efficient alliances which would maximize assignment of market value to licenses. These alliances would be discouraged by the mandate to expose the highly sensitive details of the alliance to the scrutiny of competitors. Even where the alliance seeks the protection of Commission rules governing proprietary information, the relatively narrow protection of those provisions (47 C.F.R. §§ 0.457 and 0.459) will have a dampening effect on alliance creation.

Without limiting these concerns, SBC expresses particular objection to the requirement that any management agreements or consulting contracts be filed. These terms lie at the heart of the collective undertaking. Further, so long as performance requirements are met and the applicants have not received any special treatment in the bidding process, any terms in such agreements cannot demonstrate "unjust enrichment," but rather only the benefit of a participant's bargain.

Finally, SBC seeks clarification that the disclosure requirements, if adopted in some form, will apply only to the licensees who have either not begun to offer service to the public or who have only offered service for some minimal period of time. The Order provides no justification for its imposition on later transfers.

III. THE COMMISSION SHOULD ANNOUNCE THE NAMES OF WINNING BIDDERS FOR EACH AUCTION ROUND.

Nearly all commenters agreed that maximizing the information available to bidders "minimizes bidder uncertainty and thus may increase bids by alleviating the winner's curse." It also "increases efficiency of license assignments by providing bidders with useful information about the likely availability of

complementary services and standards both inside and outside the area they wish to serve." Order, ¶ 158. Notwithstanding such advantages, the Commission simply concluded that this information is not as important as deterring imagined collusion and decided to keep the names of winning bidders secret on the theory that releasing the identities "may foster strategic manipulation, e.g., bidding up licenses critical to rivals' business plans." *Id.*

Yet the decision to keep winning bidder identities secret itself creates the opportunity for collusive behavior. Cartels require an opportunity to coordinate activities and to punish any violator. See Congressional Budget Office, *Auction of Radio Spectrum Licenses* 44 (March 1992). Sealed bid auctions without disclosure of winning bidder names provides the cover necessary for implementation of such arrangements, for it makes detection of the strategy considerably less apparent. On the other hand, because bid rigging is a per se violation of the Sherman Act (15 U.S.C. § 1), participants are not likely to engage in such activity when everyone has access to each other's bidding activity. Also, if the identity of all bidders is known, the Commission need not be concerned with assuring that the identity of all bidders is protected. Likewise, the Commission need not be concerned whether a particular bidder may have illegally or otherwise obtained the identity of other bidders and bidders will not need to be concerned with protecting their identity.

The Commission's decision unfairly implies that responsive bidding strategy based on knowledge of the identity of a potential competitor is inherently collusive. Knowing who the

successful bidders are affects other bidders' ability to assess the accuracy of their prior valuation of the spectrum, which maximizes the probability that a market value will be achieved. Identifying successful bidders also allows other bidders to ascertain that an aggregation of licenses is underway which might pose a competitive threat. This information may increase the remaining bidders' appraisal of the value of licenses previously thought unrelated. Such behavior is not collusive but merely prudent.

The Commission should announce both the identity of the winning bidder and the bid amount for each round of each auction.

IV. CONCLUSION

WHEREFORE, SBC respectfully requests the Commission to grant the relief requested herein.

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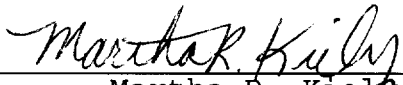
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CERTIFICATE OF SERVICE

I, Martha R. Kiely, hereby certify that copies of the foregoing Petition for Reconsideration of *Second Report and Order* of Southwestern Bell Corporation have been served by first class United States mail, postage prepaid, on the parties listed on the attached.



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